

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: :  
 : Docket #20cv5396  
 UNITED STATES OF AMERICA and :  
 STATE OF NEW YORK ex rel. PATRICK :  
 DONOHUE, :  
 :  
 Plaintiffs, :  
 :  
 - against - :  
 :  
 RICHARD CARRANZA, et al., : New York, New York  
 : April 27, 2022  
 Defendants. :  
 :  
 ----- : TELEPHONE CONFERENCE

PROCEEDINGS BEFORE  
THE HONORABLE STEWART AARON,  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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THE COURT: This is Magistrate Judge Aaron.  
This is the matter United States ex rel. Donohue against  
Carranza, 20cv5396. This line is being recorded.  
Because we have a large number of counsel on the line,  
I'm going to go down in the order of the caption to take  
appearances. First of all, who do we have on the line on  
behalf of the plaintiff?  
MR. RORY BELLANTONI: Good afternoon, Your  
Honor, for plaintiffs, Rory Bellantoni, Brain Injury  
Rights Group.  
MS. ASHLEY RUSSO: And, Your Honor, Ashley Russo  
from the Brain Injury Rights Group is on the line as  
well.  
THE COURT: All right, who do I have on behalf  
of Buffalo Public School District, if anyone?  
(no response)  
THE COURT: Okay, who do I have on behalf of,  
well, actually I already heard, before we started the  
recording, but why doesn't counsel from Katten Muchin  
enter his appearance please.  
MR. JOSEPH WILLEY: Okay, this is Joseph Willey  
from Katten on behalf of the City of New York School  
District defendants. And I believe I have also Steve  
Kitzinger from the New York City Law Department. Are you

1  
2 on, Steve?

3 MR. STEPHEN KITZINGER: I am, good afternoon,  
4 Your Honor, Stephen Kitzinger at New York City Law  
5 Department for the New York City Department of Education  
6 defendants.

7 THE COURT: And, Mr. Willey, I note  
8 (indiscernible) also identified for the record the other  
9 parties you represent please.

10 MR. WILLEY: Yes, Your Honor, we also represent  
11 the L.A. County, Los Angeles County School District  
12 defendants and the Chicago Public School District  
13 defendants. I also have on the line from my firm  
14 Alessandra Denis.

15 THE COURT: All right -

16 MS. ALESSANDRA DENIS: Good afternoon --

17 THE COURT: Yes, good afternoon.

18 MS. DENIS: Good afternoon, Your Honor.

19 THE COURT: Good afternoon. And who do I have  
20 on behalf of the Stamford Public School District?

21 MR. RYAN DRISCOLL: Good afternoon, Your Honor,  
22 Ryan Driscoll from Berchem Moses in Milford, Connecticut.

23 THE COURT: Okay. And who do I have on behalf  
24 of Wainscoll County.

25 MR. JOHN DARMINIO: Good afternoon, Your Honor,

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John Darminio, Wood Smith Henning & Berman for the Wade County defendants.

THE COURT: Okay, and although I'm not sure anyone as yet appeared as counsel of record on behalf of the San Diego Unified School District, is anyone on on their behalf?

MR. ENRIQUE VASSALLO: Yes, Your Honor --

MS. WHITNEY ANTRIM: Yes, Your Honor.

MR. VASSALLO: It's Enrique Vassallo from Orbach Huff Suarez & Henderson. We represent the San Diego Unified School District as well as Lamont Jackson and Cindy Marten, defendants.

MS. ANTRIM: And Whitney Antrim also from Orbach Huff & Henderson with the same.

THE COURT: Okay, and have you entered notices of appearance yet?

MS. ANTRIM: We have not.

MR. VASSALLO: I do - we have not, Your Honor. I just submitted my application pro hac vice which was just granted, and we will do that immediately after this call.

THE COURT: Okay. And I take it we still don't have anyone who's joined us from the Buffalo Public Schools. I'm just going to ask my law clerk. Could you

1  
2 just step out and lop a call into this person? I know  
3 that we're not technically discussing a matter before  
4 them, but since they're counsel of record, why don't we  
5 try to get them on the line. Okay?

6 All right, so the way I wanted to start out was  
7 to make some observations generally, and then I do want  
8 to hear from the parties and, you know, I'll do it in the  
9 order that I received the letters. So I'll hear from Mr.  
10 Willey first, then I'll hear from the other defense  
11 counsel, then, of course, I'll hear from plaintiffs'  
12 counsel.

13 So what the law is with respect to my  
14 consideration of the merits in making a recommendation to  
15 Judge Woods is that unless the court has personal  
16 jurisdiction over defendants, generally speaking, a court  
17 doesn't rule on the merits of the case. And that's, as  
18 you may be aware, a case out of the United States Supreme  
19 Court called *Sinochem International against Malaysia*  
20 *International Shipping*, 549 U.S. 422, decided in 2007.  
21 There is an exception where there are defendants who can  
22 test personal jurisdiction but others do not, and it's  
23 kind of a practical one, right, where if one must  
24 inevitably resolve the merits, it can be done not only  
25 for one but for others.

The fly in the ointment here, it seems to me, is that there not only are claims under federal rule but there also are claims asserted under state law with respect to the parties who submitted letters. So, by way of example, California statute, and what I understand to be a unique issue at the California perhaps, regarding the issue of whether or not California school districts are considered arms of the state.

So I have reluctance, I guess would be the word that I'll use, to rule on the merits with respect to defendants over whom the Court lacks personal jurisdiction if there are unique legal claims as to those defendants because those claims perhaps should be determined by a court that has jurisdiction and by a venue where a venue is proper. So, for example, in the case of California defendants, in California.

Another observation I'd like to make is that the briefing so far, there's a motion that was already made by the Wade County defendants. Everyone is focusing on the context that exists with the State of New York, and I alluded to this in footnote 4 of my prior opinion which, as we know, dealt with yet a different set of defendants, what I refer to as the Loudon County defendants, and that is whether in circumstances where there's a federal



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2 statute that provides for nationwide service of process,  
3 whether or not the proper analysis is under the  
4 Fourteenth Amendment of contacts with the State of New  
5 York or under the Fifth Amendment looking at contacts  
6 with the United State writ large. And as I was preparing  
7 for this call, I reminded myself that there's a case out  
8 there that I don't believe I cited in my footnote, but  
9 it's a case by Judge Castel - let me see if I can find it  
10 here.

11 I'm not exactly sure what I did with the case by  
12 Judge Castel, but it's also in footnote 4, and it arises  
13 in the context of the false claims act where he found --  
14 admittedly in that case it was a case involving a  
15 defendant out of the United Kingdom, but I think the  
16 analysis - oh, here it is. Apologies. *United States ex*  
17 *rel. Tzak, T-Z-A-K, against Christian Aid*, 2021 W.L.  
18 2354985, and he cites a case called *Marriosh*, which is  
19 one that I cite in footnote 4 of my prior opinion. And  
20 I'll just read like an excerpt, "When a civil case arises  
21 under federal law and a federal statute authorizes  
22 nationwide service of process, the relevant contacts for  
23 determining personal jurisdictions or contacts with the  
24 United States as a whole." And that's what satisfies the  
25 Fifth Amendment's due process inquiry.

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So obviously if one looks at personal jurisdiction from the perspective of contacts with the United States, any school district located anywhere in the United States theoretically there's personal jurisdiction over it if that's the right analysis.

Having said all of that, I am happy to have the defendants brief whatever issues they want to brief. In other words, if Katten on behalf of its clients wishes to seek to convince me that, notwithstanding the lack of personal jurisdiction if that's their position, that there is no personal jurisdiction, and notwithstanding the lack of venue, I should make recommendations to Judge Woods regarding the merits, make that argument. And given that I'm doing a report and recommendation as opposed to ruling on the motion myself, as I did because the parties consented to it in the prior one, it may be that I feel I have to deal with all of the issues that are put before me. But I am concerned about, as I said, the fact that there may be unique state law issues that are more appropriately determined by a district court sitting in a state whose law is being applied.

So with that, I'll turn the floor over to you, Mr. Willey, to make whatever remarks you wish to make, and then as I mentioned, I'll go around the horn.

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MR. WILLEY: Okay, great. Thank you, Your

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Honor. So when we requested this conference, I know this

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conference is not required by your rules, but we

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requested it because we believe that a conference with

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the parties and the Court might obviate the need for a

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motion to dismiss or at least to narrow the issues. It

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seemed that there was some relevant agency, federal and

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state agency guidance applying the applicable Medicaid

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and IDEA laws and regulations that had not been reflected

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in the complaint and perhaps that overlooked that we

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thought were right on point and that should be considered

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here early on.

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So the core allegations in the Relator's second

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amended complaint are that essentially that school

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districts submitted Medicaid claims and received IDEA

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funding for related health services furnished to school

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children remotely during the COVID pandemic when schools

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were closed. That's one of the allegations, that they

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were not allowed to bill and receive funding for remote

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services.

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Secondly, the second core allegation is that if

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there were to be remote services during school closures,

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the individual education plans or programs, the IEP's,

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that the documents required by the IDEA to specify the

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2 related health services each child is to receive, that  
3 those IEP's needed to be amended to reflect that the  
4 services were being provided remotely rather than in  
5 person.

6 And the third core allegation is that the school  
7 districts, if they billed Medicaid for services provided  
8 remotely, they should have done so at lower rates than  
9 the Medicaid rates that the state Medicaid agencies have  
10 established for in-person services.

11 So we believe that these allegations that are in  
12 the complaint are not viable, and they should not be  
13 pursued because the relevant federal and state agencies  
14 that administer these programs, the Medicaid program and  
15 the IDEA, have issued clear guidance to schools that  
16 schools may provide the services remotely during school  
17 closures as a result of the pandemic. And that the  
18 students IEP's did not need to be amended to reflect the  
19 services would be provided remotely and that the schools  
20 should bill Medicaid at the regular Medicaid rates for  
21 these services.

22 So each of the core allegations in the complaint  
23 have been addressed by the agencies and they have  
24 permitted the school districts to provide the services in  
25 the way that they are alleged to have provided these

1  
2 services in the complaint. In other words, the very  
3 conduct that the complaint alleges is unlawful is, in  
4 fact, fully consistent with the Medicaid and IDEA  
5 requirements. So the claims at issue cannot possibly be  
6 said to be false when furnished and billed exactly as the  
7 program required.

8           So there are other bases for dismissal as noted  
9 in my April 12 letter, you know, at least as to the  
10 California school districts, as you alluded to, Your  
11 Honor, there is Ninth Circuit authority that school  
12 districts are arms of the state and are not subject to  
13 suit under the Federal False Claims Act. So it seems to  
14 us that the allegations in the complaint as to the  
15 Federal False Claims Act should be withdrawn.

16           There is also case law in the Ninth Circuit that  
17 the school districts in California are not subject to  
18 suit under the state false claims act, the California  
19 False Claims Act. And there's, you know, as in New York,  
20 in New York the state false claims act statute on its  
21 face provides that school districts in New York are not  
22 subject to suit under the state false claims act.

23           So I understand Your Honor's observations about  
24 the state false claims acts in the various states. Those  
25 statutes - I guess at this point I will just make an

1  
2 additional observation that the state false claims acts  
3 are by and large I think patterned on and designed to,  
4 are designed to mirror the federal false claims act, and  
5 there are certain reasons why state legislatures have  
6 enacted state false claims acts to essentially mirror the  
7 federal false claims act. I don't believe that the  
8 complaint makes allegations that are unique to the  
9 various state false claims acts. It may be that relator  
10 alleges that the same conduct would violate both the  
11 federal and state false claims acts, but I think that's  
12 because the statutes are essentially the same in that  
13 regard. So there are not specific allegations that the  
14 conduct alleged violates one or the other.

15           Whether we will argue to Your Honor that to make  
16 a recommendation to Judge Woods that you decide the case  
17 on the merits as to Los Angeles and Chicago school  
18 districts, I don't think we're there yet where we've made  
19 that decision. But at the very least we would submit  
20 that Your Honor should consider the approach taken by the  
21 district court in the *Taconic Hills* case which I know  
22 Your Honor cited in your decision as to the Loudon,  
23 Virginia defendants, which is to decline to transfer the  
24 case in the interests of justice if you determine the  
25 venue is not proper. There the district court found that

1  
2 the allegations against the school districts outside of  
3 the Southern District of New York were almost identical  
4 to the allegations against the New York City Department  
5 of Education. And so in the interests of justice, Judge  
6 Crotty decided to not transfer the case to those other  
7 districts even though venue may have been proper in those  
8 other districts.

9 THE COURT: That was upstate counties, upstate  
10 districts, am I right, am I remembering that case  
11 correctly?

12 MR. WILLEY: That's correct, Your Honor.

13 THE COURT: Right, not other states.

14 MR. WILLEY: That's correct. So that is a  
15 summary of the highlights of the complaint and of our  
16 reactions to the complaint that we anticipate being  
17 included in a motion to dismiss. You know, there are  
18 some other issues, but I believe those are the core  
19 issues. And as I said, we thought it may be helpful to  
20 bring this to the attention of the Court and to the other  
21 parties so that we can decide whether there are claims  
22 that might be narrowed or whether the motion might be  
23 obviated altogether.

24 We cited some of that agency guidance in my  
25 letter of April 12. There's more. But the guidance was

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2 issued by the U.S. Department of Education, the Federal  
3 Centers for Medicare and Medicaid Services which govern  
4 at the federal level the Medicaid program, and then we  
5 cited at least for our clients the guidance issued by the  
6 New York State Medicaid agency and state education agency  
7 as well as guidance from California and Illinois.

8

THE COURT: All right, so let me ask  
9 plaintiffs' counsel - before I turn to other defense  
10 counsel, let me ask plaintiffs' counsel, having heard  
11 what you heard, are you willing to narrow any of the  
12 claims in the case?

13

MR. BELLANTONI: Well, let me - if I may just  
14 address that, Judge, (indiscernible). The one claim that  
15 can be narrowed, I'm not sure how, I think it is clear,  
16 based on what counsel shared with me - I did not realize  
17 this until he shared the cases with me that in the State  
18 of California, it's pretty clear cut that school  
19 districts are not considered persons or the person of a  
20 qui tam action, and the district courts use in an  
21 Eleventh Amendment analysis to decide whether or not the  
22 school districts are arms of the state. The one issue I  
23 have, the one place I'm hung up is under the IDEA school  
24 districts that accept federal funds waive their Eleventh  
25 Amendment protection.



What I have not yet figured out, Your Honor, and I apologize for my inability to do it, is whether or not the analysis by the district courts is using the Eleventh Amendment as an example to determine whether or not the school districts are persons or literally applying the Eleventh Amendment, literally saying because the Eleventh Amendment grants the school districts immunity as arms of the state, then they can't be sued. If that's the case, then they don't have immunity under the IDEA. Medicaid I have not found an answer to that question yet, whether or not the state accept federal funds, if they waive the same protection. But if the courts were using the Eleventh Amendment by way of analysis, then the IDEA may not give the school districts the protection counsel claims they are.

So the question then is if we agree to brief that singular issue to Your Honor, depending on the ruling, we may have to brief (indiscernible) subsequently. So I don't know if that narrows the issues or perhaps created some more work for the Court. Then if this argument were included in a general motion to dismiss, if that makes any sense, Judge.

THE COURT: Okay, so with respect to the main event, for lack of a better term, the federal statutory

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2 claims, you're not persuaded by the argument made and  
3 you're not, and I think Mr. Willey used the words  
4 withdraw the claims, that that's not something you're  
5 inclined to do.

6 MR. BELLANTONI: I would say, Judge, I'm at 85  
7 percent. I have not yet discussed with Mr. Willey the  
8 exception to the IDEA. If he convinces me the way he  
9 convinced me in the first instance that the school  
10 districts are not arms of the state, that the Eleventh  
11 Amendment exemption or the IDEA is inapplicable with  
12 respect to this analysis, I don't think I have any choice  
13 but to withdraw the claims.

14 As I said, my only reservation at this point is  
15 not a matter of whether I'm willing to or not, I'm just  
16 not convinced that the protection that the school  
17 districts have under the Eleventh Amendment applies where  
18 the statute said they expressly waive that protection  
19 under the IDEA. I mean this would just preclude bringing  
20 the claim in the first instance. Obviously, there are  
21 the other issues that were addressed, you know, for  
22 instance, the online learning. Yet there's federal  
23 guidance that says students can be taught online. But  
24 what was left out, as I'm looking at the question and  
25 answer guidance from the Department of Education, it's

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2 March 12 of 2020, online remote learning can be included  
3 in a child's IEP if the IEP is created through the normal  
4 process, including with consent of the parents.

5           The problem here is not simply the online  
6 learning that was done unilaterally, and our position is  
7 it was done unilaterally. There's a change in the way  
8 the program was being administered, the educational  
9 program, that constitutes a change of place and required  
10 the very consent that the federal guidance that counsel  
11 refers to, that he referenced in the first instance, and  
12 that is, again, may an IEP team consider this his  
13 learning plan in a child's IEP as a contingency plan, it  
14 (indiscernible). And the answer to that is yes, IEP  
15 teams may do so, but if an IEP team meets with the  
16 parents, parental participation is a component of the  
17 IDEA, and the guidance goes on to say that creating this  
18 plan ahead of time gives service providers and the  
19 parents an opportunity to reach an agreement as to what  
20 circumstances would trigger.

21           So I don't know that there's any agreement on  
22 that issue, but as I said, the first issue, if Your Honor  
23 feels it does narrow the issues and make it easier, I  
24 have no issue, no problem, Judge, with briefing this  
25 issue whether or not the school districts are arms of the

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2 state and whether or not the Eleventh Amendment analysis  
3 is actually an analysis that gives the districts  
4 protection under the Eleventh Amendment or that the  
5 courts are using that by way of example to illustrate  
6 they're not persons. I think, Your Honor, I don't know  
7 that this is something that California courts, that's  
8 unique to them.

9 I would say early on in New York I think the  
10 Second Circuit was of the same opinion. Today, they're  
11 not. They do a case-by-case analysis to determine  
12 whether school districts are arms of the state. Whether  
13 or not a high school or elementary school or even a  
14 community college, there's a case out of Westchester,  
15 Westchester Community College, because of the unique  
16 circumstances was found not to be an arm of the state.  
17 There's two different tests the Circuit uses. One is a  
18 the two-part test and one is a six-part test.

19 But clearly, again, I would have to concede in  
20 the first instance the case law says that the school  
21 districts are not arms of the state. The only question  
22 then becomes whether or not the exemption under the IDEA  
23 makes them fair game for a (indiscernible) suit or not.  
24 If briefing that singular issue is narrowly the issue, I  
25 have no problem briefing that first to the Court, and if

1 21

2 Your Honor decides that they are arms of the state  
3 notwithstanding the Eleventh Amendment protection, that  
4 is what it is, and the other arguments need not be  
5 briefed.

6 But, again, if Your Honor finds that the school  
7 districts are not deserving of amendment protection, that  
8 leaves counsel in the position of having to bring another  
9 motion, and I don't know if that narrows the issues or  
10 makes them more complicated, Judge.

11 THE COURT: Yeah, so from my perspective, we  
12 are not having multiple briefing on multiple levels.  
13 We're going to do the whole shooting match. So, Mr.  
14 Willey, I'll give you a chance to respond. It sounds  
15 like plaintiffs' counsel, subject to that one California  
16 exception, declines to withdraw his claims. So you're  
17 going to file a motion, right?

18 MR. WILLEY: Yes. I mean I would - I know Mr.  
19 Bellantoni addressed one of the three core allegations in  
20 the complaint that I discussed which has to do with  
21 whether IEP's need to be amended, and I understand he  
22 said that the parents have to participate and, that the  
23 parents have to participate when an IEP is amended. And  
24 I think what the agency guidance was that they do not  
25 need to be amended, and, therefore, they do not need to

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involve parental consent to remote learning when schools are closed.

So there were two other core allegations which is just one where services can be billed to Medicaid when services are provided remotely at all, and then at the rates, what rates. There were numerous allegations throughout the complaint that somehow the school districts were to bill at special rates or lower rates. And even though they didn't cite any state establishment of rates other than regular rates, Mr. Bellantoni didn't address that in his comments. I didn't know whether that was, he just hadn't gotten to it or whether that was purposeful.

THE COURT: You know, I'm not sure what purpose it serves, but, Mr. Bellantoni, feel free to respond to those points, since you're going to have to --

(interposing)

MR. BELLANTONI: Your Honor --

THE COURT: -- a motion to --

MR. BELLANTONI: I'll - I'll defer to Ms. Rousseau on this issue, Judge. The issue is more than just services, whether they can be billed at a lesser rate. The issue is whether or not services that were claimed and been provided, for instance, physical

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2 therapy, even if the authority exists in the way counsel  
3 suggested exists that needs to be billed at a lesser  
4 rate, part of the false claims act is you're not  
5 providing the service you claim you're providing. You  
6 can call physical therapy physical therapy, but if you're  
7 not putting hands on a child and delivering a physical  
8 therapy session, then I'm not sure why you're billing for  
9 physical therapy or occupational therapy if it's being  
10 delivered in a different manner.

11           If counsel is representing there were new  
12 sections created in Medicaid, for instance, online, so-  
13 called physical therapy billed at a lesser rate, that  
14 might be a different story. But what I've seen so far is  
15 that the complaint also contains allegations that these  
16 services, although claimed to have been provide, simply  
17 weren't because they simply can't be. And I'll let Ms.  
18 Rousseau address that further.

19           MS. ROUSSEAU: Sure. To echo Mr. Bellantoni's  
20 point, I believe in the complaint one of the  
21 illustrations and probably one of the best is that there  
22 was a 15-year-old non-verbal autistic child or young man  
23 rather who was receiving speech therapy over the phone,  
24 and now if he's autistic non-verbal, he doesn't  
25 communicate, you know, speaking; he uses an assistive

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communication device. So those discrepancies that we're talking about, if that makes sense, if the illustration gives it, you know, more depth.

MR. WILLEY: Yeah, I understand that, and I don't want to - I don't think we should just be arguing the merits of individual cases. I just want to make the broader point that I think the point of this conference is so that we understand each other's position. If the service is on the IEP, identified in the IEP, it is billable to Medicaid if it's provided. Whether the service meets the IDEA, you know, whether all the services that the child receives meets the IDEA requirement that there's a free and appropriate public education, that's not a requirement for Medicaid billing. For Medicaid billing the requirement is that the service be on the IEP and that the service be provided. And the agencies have said those services can be provided in person, or during school closures as a result of the pandemic, they can be provided remotely. And so if those services on the IEP are furnished remotely or in person, they're billable to Medicaid.

Whether you might believe that they would be better provided in person even though the schools are closed or whether they should be in person, it doesn't,



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that's not really the requirement here, the Medicaid requirement.

So I would, you know, I would ask that you consider the Medicaid requirements for billing for related health services. Those requirements do not incorporate the overall requirement in the IDEA that all the services a student receives must be, must satisfy the free and appropriate public education requirement. That's an IDEA requirement.

MS. ROUSSEAU: And with all due respect to the Court, I'll just address this briefly because I don't want to argue at this conference. I think that there's a, there might be a disconnect a little bit between what I'm saying and what you're saying. I understand what you're saying, Mr. Willey, but the other aspect of this, and I heard you mention a bunch of different Medicaid guidelines, how it came down from the federal, it goes to the state. The federal guidelines during the COVID closures were that if a provider was going to offer services to a student with special education under the IDEA, they must offer it in a way that they should see that child or it should imitate or mirror an in-person visit.

So I know that I gave you a specific example,

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2 but it's children like that, children who were non-verbal  
3 getting speech over the phone, who were blind getting,  
4 you know, inappropriate services, it's those situations  
5 that we're talking about. So, you know, in those  
6 respects we're saying that billing for, you know, a  
7 service that was not rendered face to face or mirrored an  
8 in-person visit was inappropriate and ran afoul of the  
9 federal Medicaid guidelines. I hope that that clears  
10 that up.

11 MR. WILLEY: Which federal Medicaid guidelines  
12 does that run afoul of?

13 MS. ROUSSEAU: I could find it for you --

14 MR. WILLEY: I'm not putting, I'm not trying to  
15 put you on the spot, I just, Ms. Rousseau, I just really,  
16 I'm having a hard time understanding, you know, you are  
17 saying that the services have to meet some requirements  
18 that I believe emanate from the IDEA overall whether a  
19 student is receiving a free and appropriate public  
20 education, but the Medicaid requirements are really just  
21 in the service, speech therapy or whatever it is, on the  
22 IEP and was that service provided. And, you know,  
23 whether you think it was provided in the best way  
24 possible, those are the requirements.

25 MS. ROUSSEAU: I think, respectfully, Mr.

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Willey, we're just at a disagreement. So I think, you know, perhaps Judge Aaron, and I don't, I know you don't want to do extra briefing, so I'm not sure if I should continue. I don't want to waste the Court's time or anyone else's time that's on the line. I know that there's another attorney that also wanted to speak.

THE COURT: Yeah, there's two or three others. But, look, you'll receive the memorandum filed on behalf of the defendants or memoranda. I believe there's already a schedule in place. And obviously if the plans are without merit, you ought to consider withdrawing them. I haven't heard Mr. Willey say that he believes so much in the strength of his position he's going to send you a 21-day notice under Rule 11. If he believes that that's the case, that's certainly his prerogative. And if you don't withdraw it within the 21 days and he's right, there are consequences that flow from that.

But I personally have not studied these issues as carefully as the both of you have, but facially, what Mr. Willey is saying makes sense. I can't tell you whether he's right or not because, as I say, I haven't studied it. But we're going to proceed to briefing.

Let me ask, because I said I would give an opportunity for others to speak. Let me hear from Mr.

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2 Driscoll if there's anything you would like to add to  
3 this discussion.

4 MR. DRISCOLL: Thank you, Your Honor. I think  
5 a lot of the substantive issues that the Stamford Board  
6 of Ed would intend to raise were just covered here. I  
7 think we stand in a similar position, particularly with  
8 respect to the applicability of the false claims act  
9 given Connecticut law on whether the boards are an entity  
10 that is subject to that. I think the remainder Attorney  
11 Willey really covered, is probably what the plaintiffs  
12 could expect from the Stamford Board of Education, and we  
13 would echo all the arguments he made. I don't think I  
14 want to take up anyone else's time with that with, you  
15 know, repeating what he's already said, but that is in  
16 large part what we would be arguing as well.

17 THE COURT: Okay, and I know we had somebody on  
18 behalf of the San Diego Unified School District. I  
19 didn't know if there's anything you wish to add.

20 MS. ANTRIM: Yes, this is Whitney -

21 MR. VASSALLO: Your Honor --

22 MS. ANTRIM: Oh --

23 MR. VASSALLO: Go ahead, Whitney, go ahead.

24 MS. ANTRIM: This is Whitney Antrim on behalf  
25 of San Diego Unified as well as the individuals named as

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2 superintendents at the time. I have two issues I'd like  
3 to add. I certainly join all of the issues raised,  
4 especially as to the California statute. But we have two  
5 issues individual, well, collectively two. To the - and  
6 from what I'm hearing, to the extent that we're talking  
7 about individual students and their respective IEP's,  
8 courts have been very clear that the decision around  
9 whether or not a state has been provided has to be  
10 decided at the administrative level. And so to the  
11 extent that these individuals have not exhausted  
12 administrative remedy, I think there is yet another bar  
13 to this court hearing this case at this time because  
14 those remedies have not been exhausted, and federal  
15 courts have been pretty clear that they don't want to be  
16 in the business of assessing individual IEP's like the  
17 child that Ms. Rousseau described, the autistic non-  
18 verbal child receiving state services allegedly over the  
19 phone.

20           And so if we're going to be getting into the  
21 nitty gritty, as it were, on each and ever one of the  
22 children, I think exhaustive administration remedies  
23 under IDEA 1415, I think it's 3(i), has to be considered.  
24 So that will be one of the additional arguments that  
25 we'll be bringing.

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But specific to San Diego is that the child whose IEP has been brought at issue has actually settled with the San Diego Unified School District and signed a general release in settlement, and we believe that this is proceeding in a way that the child's family has agreed not to. And understanding it's a (indiscernible), but to the extent that it's based on his IEP and his situation, we think that there's additional issues there.

THE COURT: All right, again, I would encourage the plaintiff to consider the arguments made when they receive the memoranda and withdraw claims as appropriate and if appropriate.

Was there anyone else before I hear again from the plaintiffs' side, is there anyone else on the defense side who I haven't heard from that would like to be heard?

MR. KITZINGER: Yes, Your Honor, Steve Kitzinger from the New York City Law Department.

THE COURT: Yes, go ahead.

MR. KITZINGER: I just wanted to bring back around to an issue that Mr. Willey raised but was not responded to, and that is the state false claims act claims where the statute, for example, the New York State and New York City false claims act statutes exclusively

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exclude the City of New York and a claim by the City as being subject to those statutes. And I think regardless of the merits or lack of merit of the federal false claims act claims asserted against the City by relator, it really can't be challenged that he cannot bring claims successfully under the state and local false claims act statutes against the City of New York defendants at a minimum.

And I think even if we can't narrow the big issues, maybe we can save a few pages and a little ache on the narrower issues.

THE COURT: Okay, plaintiffs, do you agree to withdraw your claims under the state IDEA against the City of New York?

MR. KITZINGER: The state STN. Sorry, Your Honor.

MR. BELLANTONI: Your Honor, again, I wasn't involved in drafting this complaint two years ago. When I was pointed to the authority that says the state or state entities in New York cannot be named in state false claims act cases, that appears to be what the statute says. I don't think that precludes the federal action for violating the federal false claims act although where I was in my research was trying to determine if the state

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2 exemption somehow applies to the federal statute. If  
3 courts, district courts in New York have said because the  
4 state exempts, you know, municipalities and school  
5 districts, the school districts are free completely and  
6 altogether from false claim cases, I don't believe that  
7 to be the case, Judge. To the extent that the state  
8 statute precludes these causes of action against school  
9 districts like the City of New York, I would just say I  
10 don't believe I have any choice but to withdraw that  
11 cause of action since that is what the statute says,  
12 Judge.

13 THE COURT: Okay, so, Mr. Kitzinger, you'll  
14 make the arguments, and it sounds like Mr. Bellantoni  
15 will look at them and in his opposition will say we  
16 concede, and we agree that these claims should be  
17 withdrawn.

18 MR. BELLANTONI: Or, Your Honor, I may even  
19 stip those out prior to.

20 THE COURT: Okay.

21 MR. BELLANTONI: I'm not prepared to say 100  
22 percent right now, but I don't think I need to review his  
23 argument. I will review that on my own before the  
24 motion's filed, and we'll resolve that issue one way or  
25 the other before the motion. I don't think it would be



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2 the right thing for me to do to reserve that argument for  
3 motions if I'm convinced that they should be withdrawn.  
4 I believe I have an obligation to do that before the  
5 motion's filed.

6 THE COURT: All right, so I'll make this  
7 comment, and obviously since I'm not presiding, we'll  
8 have to get this approved by Judge Woods. But it seems  
9 to me, since we're already on to a later iteration of the  
10 second amended complaint, as opposed to doing a third  
11 amended complaint and thereby mooting the prior motions,  
12 I believe that Judge Woods would be amenable to a  
13 stipulation agreeing to withdraw this claim or this part  
14 of a claim, however it's worded, and to deem the second  
15 amended complaint amended by the stip. I can run that by  
16 him, but if the parties are amenable to doing that, I  
17 propose that we send a letter to me with a proposed  
18 stipulation, and I will get Judge Woods's approval to so  
19 order it.

20 MR. BELLANTONI: That's fine with plaintiffs,  
21 Your Honor.

22 THE COURT: Okay. Is there anyone else that  
23 wishes to be heard on this call who hasn't been heard?

24 MR. WILLEY: Your Honor, this is Joseph Willey.  
25 If I could just add one point. Your Honor alluded to

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2 Rule 11 as a vehicle to raise some of the points we were  
3 discussing. I guess I'd just like to also note that the  
4 false claims act itself includes a provision on shifting  
5 of attorney's fees when claims are asserted  
6 inappropriately. And so I would suggest that we and that  
7 the plaintiffs take that into account as well, not just  
8 Rule 11, in deciding whether to go forward on a claim  
9 where there's specific agency guidance that permits the  
10 defendants to provide the services and bill for the  
11 services the way they are alleged to have been provided  
12 and billed in the complaint.

13 THE COURT: All right, anything else?

14 MR. KITZINGER: Your Honor, this is --

15 (interposing)

16 MR. KITZINGER: I'm sorry, I lost the  
17 connection. I am now back. I hope I didn't miss  
18 anything.

19 THE COURT: Mr. Willey will fill you in on  
20 anything you missed. Who else wanted to speak?

21 MS. ANTRIM: This is Whitney Antrim again,  
22 thank you, Your Honor. A question and query about page  
23 limits on the motion upcoming, assuming we move forward  
24 and file it. Will the Court entertain an oral motion now  
25 to grant a few extra pages or would you prefer one in

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2 writing for our brief?

3 THE COURT: How many pages do you want?

4 MS. ANTRIM: I'd like 35 total.

5 THE COURT: Any objection from the plaintiffs'  
6 side?

7 MR. BELLANTONI: No, Your Honor.

8 THE COURT: All right, granted.

9 MS. ANTRIM: Thank you so much.

10 THE COURT: All right --

11 MR. BELLANTONI: Your Honor --

12 THE COURT: You have to --

13 MR. BELLANTONI: Would that be generally  
14 applicable to all parties or would we have to apply --

15 THE COURT: Yeah, you would get reciprocity.

16 MR. BELLANTONI: Thank you, Judge.

17 MR. WILLEY: Your Honor, we're, as you know, we  
18 are representing three major municipals defendants --

19 (interposing)

20 MR. WILLEY: I'm not at this time going to  
21 request more than that, and I don't know whether we'll be  
22 submitting one single brief or multiple briefs. But my  
23 preference I think would be to submit one with just more  
24 pages. I think that would be more efficient. But I'm  
25 not in a position to request anymore than 35 at this

1  
2 point, so as long as that's generally applicable, that's  
3 fine for now.

4 THE COURT: Yeah, it is and hopefully the  
5 plaintiff will consent if you're going to have it in a  
6 single brief or three different groups to give you more  
7 pages. If plaintiff does consent, I will, as long as  
8 within reason, approve it.

9 So the schedule that I have is motions by May  
10 27, responses by June 27, and replies by July 29. Are we  
11 on the same page?

12 MR. BELLANTONI: Yes, Your Honor, for the  
13 plaintiffs. Just so everybody's aware, I would never not  
14 consent to a request for extra pages or anything of that  
15 nature. So if counsel wants to submit something to the  
16 Court or request whatever it is now, I can't imagine a  
17 circumstance where there would be reasonable objection to  
18 a request like that. So I have no problem with counsel,  
19 you know, with one brief, even if it exceeds I don't know  
20 how many pages, certainly less than 35 times 3, that  
21 makes it easier for him and the Court, but, again, I  
22 would not object and would consent to any such a request.

23 THE COURT: All right. Okay, anything else?  
24 All right, I thank the parties, and this matter's  
25 adjourned.

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MR. WILLEY: Thank you, Your Honor.

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MS. ANTRIM: Thank you.

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THE COURT: Bye bye.

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(Whereupon the matter is adjourned.)

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C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of United States of America and State of New York ex rel. Patrick Donohue versus Richard Carranza, et al., Docket #20cv5396, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: May 20, 2022